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No. 88-979

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

D.C. TRANSIT SYSTEM, INC.

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

For Respondents, The Democratic Central Committee of the District of Columbia, Tilford E. Dudley, Bruce Terris, The Emergency Committee on the Transportation Crisis, Sammie A. Abbott, The Metropolitan Citizens Advisory Council, Thomas E. Payne, Lawrence Aaronson, Marion Barry, Jr., Linwood D. Chatman, Margaret M. Clarke, Matthew K. Clarke, Joseph Gipson, Lillian Green, Ralph Petie Green, Willie J. Hardy, Dorothy Harrison, Hubert W. Leckie, Lester McKinnie, Mrs. Robert Nash, Bernard W. Prior, Mary Ray, Frank Speltz, George E. Storey, Chauncey Thomas, William A. Wendt, Johnie Wilson, Clarence Wolrich, Maria Worris, and Mrs. Phillip Young.

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12 pp

TABLE OF CONTENTS

PAGE

Table of Authorities i

Opinions Below 1

Statement of the Case 2

Reasons for Denying the Writ 5

Conclusion 7

TABLE OF AUTHORITIES

Cases

Bebchick v. *Public Utilities Comm'n,* 115 U.S. App. D.C. 216, 318 F.2d 187 (*en banc* 1963), *cert denied,* 373 U.S. 913 (1963) 4

Bebchick v. *WMATC ("Bebchick-II")*, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973).....2, 4

Bebchick v. *WMATC ("Bebchick III")*, 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981).....2, 5

Bebchick v. *WMATC ("Bebchick IV")* 256 U.S. App. D.C. 296, 805 F.2d 396 (1896).....5

Black United Front and Democratic Central Committee v. *WMATC*, 141 U.S. App. D.C. 73, 436 F.2d 227 (1970).....3

Christianson v. *Colt Industries Operating Corp.*, 486 U.S. , 100 L. Ed 2d 811, 108 S. Ct. (1988).....7

Democratic Central Committee v. *WMATC*, 141 U.S. App. D.C. 79. 436 F.2d 233 (1970).....3

Democratic Central Committee v. *D.C. Transit System, Inc.*, 148 U.S. App. D.C. 154, 459 F.2d 1178 (1972).....3

Democratic Central Committee v. *WMATC ("DCC I")*, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973), *cert. denied*, 415 U.S. 935 (1974).....1, 2, 3, 4, 5, 6, 7

Democratic Central Committee v. *WMATC* 158 U.S. App. D.C. 68, 485 F.2d 847 (1973).....3

Democratic Central Comm. v. *WMATC ("DCC II"), 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), cert. denied*, 415 U.S. 935 (1974).....1, 2, 3, 4, 5, 6, 7

Democratic Central Committee v. *WMATC ("DCC III")*, 842 F.2d 402 (D.C. Cir. 1988).....2, 5, 6, 7

Messenger v. *Anderson*, 225 U.S. 436 (1912).....7

Panama Railroad Company v. *Napier Shipping Co.*, 166 U.S. 280 (1897).....7

Payne v. *WMATC*, 134 U.S. App. D.C. 321, 415 F. 2d 901 (1968).....3

Powell v. *WMATC*, 158 U.S. App. D.C. 301, 485 F.2d 1080 (1973).....4

Williams v. *WMATC*, 134 U.S. App. D.C. 342, 415 F.2d 922, *(en banc 1968) cert. denied*, 393 U.S. 1081 (1969).....4

Yohalem v. *WMATC, 141 U.S. App. D.C. 17, 436 F.2d 171 (1970)*.....3

Court Rules

Rules 21.1(d) and 21.1(k)(ii) of the Supreme Court.....2

Other Authorities

WMATC Order No. 773.....2, 3, 4
No. 880.....3
No. 882.....2,3
No. 894.....3
No. 895.....3
No. 896.....3
No. 900.....2, 3
No. 903.....3
No. 963.....3
No. 981.....4
No. 984.....2, 3
No. 1052.....2

D.C. Transit System, Inc. v. *Democratic Central Committee*, et al. No. 73-971, Supreme Court, U.S. Transcript of Records and File Copies of Briefs, 1973, Volume 180.....4, 6

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OPINIONS BELOW

Petitioner's identification of the opinions below is incomplete and misleading. Omitted are two earlier opinions in this case, *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 7, 485 F.2d 796 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*), and *Democratic Central Committee* v. *WMATC*, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert.*

denied, 415 U.S. 935 (1974) (*"DCC II"*). These cases are the prior merits decisions. The present case, *Democratic Central Committee* v. *WMATC*, 842 F.2d 402 (D.C. Cir. 1988) ("DCC III"), is the decision upon remand for the sole purpose of assessing damages pursuant to the rulings in *DCC I* and *DCC II*.

To cite and provide a fat appendix of detailed and largely irrelevant proceedings on remand of the two 1973 cases, *DCC I* and *DCC II*, without citing those cases is, at best, an incomplete compliance with Rule 21.1 (d). The same might also be said of the failure to include in the appendix two companion cases consolidated for argument below and extensively cross-referenced herein: *Bebchick* v. *WMATC*, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973) (*"Bebchick II"*), and *Bebchick* v. *WMATC*, 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981) (*"Bebchick III"*). But petitioner's violation of Rule 21.1(k)(ii) goes beyond that: petitioner reproduces in its appendix Transit Commission Orders 773 and 1052 without including the opinions in this case by the D.C. Circuit holding those orders illegal. Furthermore, petitioner sets forth orders 882, 900 and 984 without including the petitions for rehearing challenging them by reference to the then pending appeal from Order 773 which was eventually sustained in *DCC I*. These omitted applications are directly relevant to petitioner's first ground for granting the writ: that "rate orders issued between Order 773 and Order No. 1052 (i.e. Nos. 882, 900 and 984) were *never* challenged" (petition, p. 17, emphasis in the original).

Finally, it should be noticed that the slip opinion in *DCC III* reproduced in Transit's appendix is exceedingly inaccurate, having been amended several times after its issuance, as stated in the West reprint.

STATEMENT OF THE CASE

In the 1960's D.C. Transit completed its conversion from streetcar to buses. As a consequence, a good deal of real property formerly used in streetcar operations was obsoleted for that purpose and removed from public service. In 1967 rate hearings, the Democratic Central Committee of the District of

Columbia,[1] joined by a large number of community organizations and civic leaders, raised the issue of farepayer's entitlement to in-service appreciation of those real properties removed from operating status, the farepayers having previously borne the cost of conversion and the risk of a decline in value. Commission Order No. 773 of January 26, 1968 declined to give recognition to the public's interest in such "transferred properties," that is, "transferred" out of the owner corporation's regulated utility account into its private unregulated investment portfolio.

The farepayer's entitlement to in-service appreciation of property removed from operating status was raised not only in the 1967 proceedings leading to the January 1968 fare increase but also in all subsequent proceedings wherein rate increase orders were issued.[2]

[1] Now "The District of Columbia Democratic State Committee." To avoid confusion the former name is used throughout this brief.

[2] Orders 880 and 882 of October 18 and 29, 1968, were "interim" orders promulgated without "full and complete findings...that must accompany an exercise of...authority to prescribe permanent rates." Democratic Central Committee v. *WMATC*, No. 22, 450, 158 U.S. App. D.C. 68, 74, 485 F.2d 886, 892 (1973) quoting from Payne v. WMATC, 134 U.S. App. D.C. 321, 327, 415 F.2d 901, 907 (1968). The record and briefs in No. 22, 450, decided the same day as *DCC I* and *II*, show that these petitioners incorporated by reference their previous transferred properties arguments and objections to Order 773 in their objections to Orders 880 and 882. But the issues were not reached. Although both the Commission and the Court recognized that "it was probable that Transit's bus riders were entitled to refunds," 158 U.S. App. D.C. at 75, 485 F.2d at 893, the interim orders, recognized as based on incomplete hearings, were upheld in the emergent circumstances shown. Interim Orders 894, 895, 896, 900, 903, and 963 of December 13, 1968 through July 14, 1969, continuing with minor adjustment the same level of fares as Orders 880 and 882, were reviewed in Yohalem v. WMATC, 141 U.S. App. D.C. 17, 436 F.2d 171 (1970). There the suggestion was made that D.C. Transit "liquidate certain of its assets which were not used in connection with its Transit operations." 141 U.S. App. D.C. at 27, 436 F.2d at 181. Despite temporary stays in Black United Front and Democratic Central Committee v. WMATC, 141 U.S. App. D.C. 73, 436 F.2d 227 (1970), vacated, Democratic Central Committee v. WMATC, 141 U.S. App. D.C. 79, 436 F.2d. 233 (1970), the D.C. Circuit in the interim order cases cited generally sustained the Commission's power, under the emergency conditions shown, to award fare increases without awaiting determination of farepayer restitution issues. Postponement of such an adjudication was upheld even in the face of a receivership petition. Democratic Central Committee v. D.C. Transit System, Inc., 148 U.S. App. D.C. 154, 459 F.2d 1178 (1972). The transferred properties issue was again incorporated by reference in objections to Order No. 984 of October 24, 1969, but before an appeal could be perfected, new rates reviewed in *DCC II* went into effect and remained in effect until Transit ceased operations on January 14, 1973.

In 1969 the "transferred properties" issue was raised, in slightly variant form, upon remand of *Williams* v. *WMATC*, 134 U.S. App. D.C. 342, 415 F.2d 922, *cert. denied*, 393 U.S. 1081 (1969).*Cf. Bebchick* v. *Public Utilities Commission*, 115 U.S. App. D.C. 216, 318 F.2d 187 *(en banc), cert. denied.* 373 U.S. 913 (1963). The Commission was urged to consider as an offset to a $1,058,856 "depreciation deficiency" charged against the Riders' Fund the appreciation in value of six of Transit's real properties that had been removed from public service. The Commission declined in its 1969 Order 981, just as in its previous 1968 Order 773, to credit farepayers with appreciation of properties retired from service.

In 1970, the Democratic Central Committee and its allied community organizations and civic leaders again raised the "transferred properties" issue in Transit rate proceedings of that year which eventuated in Commission Order No. 1052 wherein the public was again denied credit for appreciation of D.C. Transit's retired properties.

These successive 1968, 1969, and 1970 Commission rulings against the farepayers' right to a credit for appreciation of removed properties were all timely appealed to the D.C. Circuit.

On June 28, 1973 the D.C. Circuit reversed all of the 1968, 1969, and 1970 transferred properties rulings and remanded the appealed cases thereon for further proceedings to determine the precise amount due farepayers: *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 21, 865, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973) *cert. denied*, 415 U.S. 935 (1974) (*"DCC I"*); *Bebchick* v. *Washington Metropolitan Area Transit Commission*, No. 23, 720, 158 U.S. App. D.C. 79, 485 F.2d 858 (1973) (*"Bebchick II"*); and *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, No. 24, 398, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert. denied*, 415 U.S. 935 (1974) (*"DCC II"*).[3]

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[3] The "transferred properties" claims presented by the Black United Front in petition No. 24, 428 were dismissed by the D.C. Circuit for want of jurisdiction because BUF failed to raise the issue in proceedings before the Commission. *DCC II*, 158 U.S. App. D.C. at 116-117, 485 F.2d at 895-896, held that only DCC's petition, No. 24, 398, "preserved the point for judicial review." BUF nevertheless participated in the remand

This Court denied certiorari in the two *DCC* cases on February 19, 1974 (No. 73-971). After completion of remand proceedings before the Commission,[4] the D.C. Circuit first entered its review decision in the companion case of *Bebchick* v. *WMATC ("Bebchick III")* 207 U.S. App. D.C. 161, 645 F.2d 1086 (1981); *Bebchick* v. *WMATC ("Bebchick IV")* 256 U.S. App. D.C. 296, 805 F.2d. 396 (1986); and later in the present case, *Democratic Central Committee* v. *WMATC ("DCC III")*, 842 F.2d 402 (D.C. Cir. 1988). Petitions for rehearing and rehearing *en banc in DCC III* were denied September 14, 1988.

REASONS FOR DENYING THE WRIT

The present remand proceedings for the assessment of damages, *DCC III*, were used by Transit to reargue, in variant terms, the 1973 rulings against it in *DCC I* and *DCC II*. Thus a good deal of *DCC III* is devoted to explaining and elaborating upon the more fundamental propositions disposed of—and discussed at far greater length—in *DCC I* and *DCC II*.

Although Transit's present petition is clearly directed to *DCC III* only—even to the point of not citing *DCCI* and *DCC II* in its "Opinions Below" and omitting these decisions from its appendix—its "Reasons for Granting the Writ" are not concerned with any of *DCC III's* restitution methodology; instead the petition is devoted entirely to claimed constitutional issues arising out of the fundamental holdings in *DCC I* and *DCC II*: that the farepayers were entitled to the appreciated value of assets removed from public service in the course of converting D.C. Transit operations from streetcars to busses, the farepayers having borne the cost of such conversion and the risk of any decline in value. *DCC I*, 158 U.S. App. D.C. 29-43, 485 F.2d 808-822.

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and subsequent appellate proceedings on the properties issue. Order 773 was sustained apart from those issues remanded in *DCCI*, Powell v. WMATC, 158 U.S. App. D.C. 301, 485 F.2d 1080 (1973).

[4] Issues involving other than "transferred properties" were also remanded, but those issues are not involved in the instant petition nor were they involved in the 1973 petition, No. 73-971.

Thus, while Transit's present petition purports to seek review of *DCC III*, it raises issues peculiar to its predecessors, *DCC I* and *DCC II*. This is evident from a comparison of the present petition with D.C. Transit's 1973 petition.[5]

What these respondents said then is even truer now. Referring to the nine related cases consolidated for argument with *DCC I* and *DCC II*, the 1973 memorandum of the Democratic Central Committee opposing certiorari asked:[6]

> There is some question at the outset of the wisdom of undertaking a piecemeal review of this exquisitely involved complex of litigation, especially since so many of D.C. Transit's present complaints are rooted in a stormy and litigious regulatory history....
>
> The absence of any constitutional issue is amply demonstrated by Judge McKinnon's dissenting views in No. 21,865 upon which petitioner relies so heavily. The issue he takes with the majority is not that their treatment of land appreciation is unreasonable nor particularly novel considering the weight of precedent supporting the majority view and the lack of precedent for the distinction urged in the dissent.... His point is simply that "the policy of judicial deference to agency actions" required upholding the Commmission's order....
>
> Analysis of agency practice and extensive local history and precedent constitute the warp and woof of both the majority and dissenting opinions in these cases.

While the Court has power to review the whole case upon a second appeal, such as this, assessing damages,[7] it ordinarily

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[5] D.C. Transit System, Inc. v. Democratic Central Committee, *et al*, No. 73-971, Supreme Court, U.S., Transcripts of Records and File Copies of Briefs, 1973, Volume 180.

[6] *Ibid.*

[7] Panama R. Co. v. Napier Shipping Co., 166 U.S. 280, 283-284 (1897)

will not do so "in the absence of extraordinary circumstances."[8]

There is not the beginning of such a showing here. Petitioner has not even requested review of *DCC I* and *DCC II* except by indirection. The denial of certiorari in *DCC I* and *DCC II* in 1973 was followed by fifteen years of protracted, painfully detailed administrative and judicial proceedings for the assessment of damages. Petitioner's superficial slogans do not warrant reopening these complex, fact-intensive decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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December 23, 1988

[8] Christianson v. Colt Industries, 486 U.S. , 108 S. Ct. , 100 L. Ed. 2d 811, 831 (1988). This case and the cases cited, Panama R. Co. v. Napier Shipping Co., *supra, n. 7,* and Messenger v. Anderson, 225 U.S. 436, 444, all involved the compelling necessity of resolving conflicts between courts of coordinate dignity.